

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77077; File No. SR-NASDAQ-2016-014)

February 8, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Retroactively Apply Recently-Reduced Port Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on January 29, 2016, The NASDAQ Stock Market LLC (“Nasdaq”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to retroactively apply recently-reduced port fees charged to members and non-members for ports used to enter orders into Nasdaq systems, in connection with the use of the FIX, RASH, and OUCH trading protocols under Nasdaq Rules 7015(b) and (g) beginning January 4, 2016.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most

¹ 15 U.S.C. § 78s(b)(1).

² 17 C.F.R. [sic] § 240.19b-4.

significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to apply recently-reduced port fees charged to members and non-members for ports used to enter orders into Nasdaq systems, in connection with the use of the FIX, RASH, and OUCH trading protocols under Nasdaq Rules 7015(b) and (g) during the period from January 4, 2016 to January 19, 2016.

Effective January 4, 2016, Nasdaq increased fees for FIX Ports under Rule 7015(b) and for RASH and OUCH Ports under Rule 7015(g) from \$550 per port, per month to \$575 per port, per month.³ Nasdaq increased the fees to offset costs associated with upgrading these ports with new field-programmable gate array (“FPGA”) technology, which is a hardware-delivery mechanism that provides improved performance in terms of predictability.⁴ Nasdaq implemented the new FPGA hardware in mid-December 2015 and increased the related port fees on January 4, 2016.⁵

Nasdaq recently encountered a few unforeseen minor, but not easily rectifiable, issues with the new implementation that potentially could have a greater impact on the market. As a consequence, Nasdaq determined that the risk associated with keeping the FPGA technology in terms of potential disruption to trading outweighed the benefit provided in terms of increased

³ See SR-NASDAQ-2016-001, which was withdrawn by Nasdaq on January 19, 2016 (available at <http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2016/SR-NASDAQ-2016-001.pdf>).

⁴ FPGA hardware is able to process more data packets during peak market conditions without the introduction of variable queuing latency, which improves the predictability of telecommunications ports over non-FPGA hardware and thereby adds value to the user.

⁵ See note 3 above.

performance. Effective January 7, 2016, Nasdaq removed the FPGA hardware and reverted all FIX, RASH, and OUCH ports to the infrastructure that was in place prior to the upgrade to those ports. Nasdaq also filed a rule change with the Commission to reduce the fees assessed for FIX, RASH, and OUCH ports back to their lower levels of \$550 per port, per month, which was effective January 19, 2016.⁶

Nasdaq proposes to apply the reduced fees of \$550 per port, per month during the period from January 4, 2016 to their reduction on January 19, 2016, effectively eliminating any fee increase for FIX, RASH, and OUCH ports. Subscribers to the affected ports did not enjoy the benefit of the improved hardware for any significant time, as the issues with the ports began to manifest themselves on December 30, 2015 up to the point at which Nasdaq determined to remove the hardware and revert the ports back to the infrastructure in place before. Thus, Nasdaq believes that it is inappropriate to apply the higher fees at any point during January 2016.⁷

2. Statutory Basis

This proposal is consistent with the provisions of Section 6 of the Act,⁸ in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,⁹ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other

⁶ See SR-NASDAQ-2016-007, which has not yet been published in the Federal Register (available at <http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2016/SR-NASDAQ-2016-007.pdf>). The Commission notes that this filing was subsequently withdrawn, because it was deemed unnecessary. Nasdaq's withdrawal of SR-NASDAQ-2016-001 effectively caused the rule text to revert to the lower fees that were in place prior to January 4, 2016. See note 3.

⁷ Nasdaq bills in arrears for the connectivity provided under Rule 7015. Thus, subscribers have not yet been billed at the higher rate in place from January 4, 2016 to January 19, 2016.

⁸ 15 U.S.C. § 78f.

⁹ 15 U.S.C. § 78f(b)(4) and (5).

persons using any facility or system which Nasdaq operates or controls, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Retroactively applying the lower fees that were assessed prior to the upgrade to the FIX, RASH and OUCH ports effective January 4, 2016 is reasonable because the improved hardware did not provide a trouble-free benefit to subscribers for a significant time during the month of January 2016. Nasdaq did not provide an improved service for the ports in return for the increased fees paid during the period from January 4, 2016 to their reduction on January 19, 2016. The basis for the increased fees was the costs associated with purchasing hardware (capital expenditures) and supporting and maintaining the infrastructure (operating expenditures) for the FPGA enhancement. Thus, retroactively applying the reduced pre-upgrade fee is reasonable.

Applying the lower pre-upgrade fees retroactively is both an equitable allocation and not unfairly discriminatory because it will apply uniformly to all market participants that subscribed to FIX Ports under Rule 7015(b), and OUCH and RASH Ports under Rule 7015(g) during the timeframe of January 4, 2016 to January 19, 2016 based on the number of such ports subscribed. Accordingly, all subscribers to the ports under Rule 7015(b) and (g) will be assessed the fees in place prior to the increase, since they did not realize a significant and trouble-free benefit from the hardware.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, Nasdaq notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable.

Nasdaq proposes to retroactively apply a lower fee since it did not provide the improved connectivity trouble-free for a significant time. Thus, Nasdaq does not believe that proposal places any burden on competition, but rather reduces fees assessed subscribers to a service, which will help maintain Nasdaq's competitiveness among equities markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁰ and Rule 19b-4(f)(6) thereunder.¹¹

In its filing, Nasdaq requested that the Commission waive the 30-day operative delay so that Nasdaq may implement the fee reduction prior to the end of its monthly billing cycle. The

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6).

Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Nasdaq bills its members at the end of the month, and, as of the time of filing, it had not yet assessed the higher port fees put in place by SR-NASDAQ-2016-001. Waiver of the 30-day operative delay will not only allow Nasdaq to manage its billing process more efficiently, but it will also ensure that subscribers are not charged erroneous and inflated fees. For this reason, the Commission designates the proposed rule change to be operative upon filing.¹²

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2016-014 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2016-014. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all

¹² For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at Nasdaq's principal office. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2016-014 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Robert W. Errett
Deputy Secretary

¹³ 17 C.F.R. [sic] § 200.30-3(a)(12) and (59).